

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 WILLIAM F JENSEN,

11 Petitioner,

12 v.

13 MIKE OBENLAND,

14 Respondent.

CASE NO. C15-1094 JCC

ORDER DENYING PETITION FOR
HABEAS CORPUS

15 This matter comes before the Court on Petitioner's objections to Magistrate Judge Brian
16 Tsuchida's Report and Recommendation (Dkt. No. 24). Having thoroughly considered the
17 parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby
18 DENIES the motion for the reasons explained herein.

19 **I. BACKGROUND**

20 Petitioner William Jensen was convicted in Washington Superior Court of four counts of
21 solicitation to commit first degree murder. (Dkt. No. 13, Ex. 2, at 2-3.) The intended targets
22 were his wife, sister-in-law, and two children. (*Id.*)

23 Mr. Jensen appealed his conviction to the Washington Court of Appeals, which affirmed.
24 (*Id.* at 4.) On review, the Washington Supreme Court vacated two of the convictions, holding
25 that Mr. Jensen was liable for only two counts of solicitation under Washington's unit of

1 prosecution rule. (*Id.* at 16.) On remand, the superior court vacated two of the counts and
 2 sentenced Mr. Jensen on the remaining two. (*Id.*, Exs. 1 and 15.) The court of appeals affirmed,
 3 and the Washington Supreme Court denied review. (*Id.*, Exs. 19–20, 25.)

4 In 2010, Mr. Jensen filed a personal restraint petition in the court of appeals. (*Id.*, Exs.
 5 27–32.) The court of appeals denied the petition, and the Washington Supreme Court denied
 6 review without comment. (*Id.*, Exs. 33, 35.)

7 Mr. Jensen now seeks habeas relief from his solicitation convictions under 28 U.S.C.
 8 § 2254. (Dkt. No. 1.) In his R&R, Judge Tsuchida recommended that Mr. Jensen’s petition be
 9 denied. (Dkt. No. 25.) Mr. Jensen objects to Judge Tsuchida’s R&R on multiple grounds.
 10

11 **II. DISCUSSION**

12 **A. Standard of Review Under 28 U.S.C. § 2254**

13 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a habeas
 14 petition can only be granted if a state court adjudication on the merits:
 15

- 16 (1) resulted in a decision that was contrary to, or involved an unreasonable
 application of, clearly established Federal law, as determined by the Supreme
 Court of the United States; or
- 17 (2) resulted in a decision that was based on an unreasonable determination of
 the facts in light of the evidence presented in the State court proceeding.

18 28 U.S.C. § 2254(d). Review under § 2254(d) is “highly deferential” and “demands that state-
 19 court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)
 20 (internal quotation marks omitted).

21 Under § 2254(d)(1), federal law is “clearly established” only if it is based on a United
 22 States Supreme Court holding that governed at the time of the relevant state court decision.
 23 *Williams v. Taylor*, 529 U.S. 362, 412 (2000). To determine whether a particular decision is
 24 “contrary to then-established law, a federal court must consider whether the decision applies a
 25

rule that contradicts [such] law and how the decision confronts [the] set of facts that were before the state court.” *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (internal quotation marks omitted). If the state court decision “identifies the correct governing legal principle” in existence at the time of its application, a federal court must assess whether the decision unreasonably applies that legal principle to the facts in the petitioner’s case. *Id.* (quoting *Williams*, 529 U.S. at 413). It is not enough that a federal court be persuaded that the decision is erroneous. *Williams*, 529 U.S. at 411. Rather, the appropriate inquiry is whether the state court’s application of federal law was objectively unreasonable. *Id.* at 409.

Under § 2254(d)(2), “[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (internal citation omitted). AEDPA demands deference to state court findings of fact, subject to a federal court’s “real, credible doubts about the veracity of essential evidence and the person who created it.” *Hall v. Dir. of Corrections*, 343 F.3d 976, 984 n.8 (9th Cir. 2003).

B. Petitioner’s Objections to the R&R

A district court reviews *de novo* the parts of a Magistrate Judge’s R&R to which any party objects. 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3). “A party properly objects when he or she files ‘specific written objections’ to the magistrate judge’s report as required under Federal Rule of Civil Procedure 72(b)(2).” *Wallin v. Holbrook*, No. C11-2165-JCC, 2012 WL 4792923, at *2 (W.D. Wash. Oct. 9, 2012). Mr. Jensen objects with varying levels of specificity to the R&R’s disposition of each of his seven habeas claims. (Dkt. No. 24.) The Court

1 will address Mr. Jensen's objections in the order he raised them in his most recent briefing.

2 **1. Objection One: Double Jeopardy**

3 Mr. Jensen was originally convicted of four counts of solicitation to commit murder, with
 4 one count per victim: Count I was his wife, Count II his sister-in-law, Count III his daughter, and
 5 Count IV his son. (Dkt. No. 13, Ex. 33, at 2.) On appeal, the Washington Supreme Court found
 6 that because the unit of prosecution for solicitation focuses on the number of solicitations rather
 7 than the number of victims, Mr. Jensen was only liable for two counts. (*Id.* at 2–3.) Therefore,
 8 the first count should have been for the first solicitation to murder his wife, sister-in-law, and
 9 daughter, and the second count for the second solicitation to murder his son. (*Id.*, Ex. 2, at 14–
 10 16.)

12 The supreme court directed the superior court to vacate two of Mr. Jensen's solicitation
 13 convictions and to resentence him on the two remaining counts. (*Id.* at 16.) On remand, the
 14 superior vacated Counts III (daughter) and IV (son) and sentenced Mr. Jensen on Counts I (wife)
 15 and II (sister-in-law). (*Id.*, Ex. 1, at 1–2.) In other words, the superior court resented him to
 16 two counts for the same solicitation—the murder of his wife, sister-in-law, and daughter. On
 17 review, the court of appeals held that the superior court had intended to sentence Mr. Jensen as
 18 the supreme court directed but made a mistake. (*Id.*, Ex. 33, at 3.)

20 Mr. Jensen argues that this was an unreasonable determination of the facts, and that the
 21 transcript instead reveals that the prosecution and superior court intentionally imposed a sentence
 22 on Counts I and II. Although Mr. Jensen fails to establish why it matters whether the superior
 23 court's error was purposeful, the Court nonetheless disagrees with his factual analysis. The
 24 transcript demonstrates that both the prosecutor and the superior court judge were aware that the
 25 supreme court had directed them to vacate two counts and resentence Mr. Jensen on the
 26

1 remaining two counts. (*Id.*, Ex. 15, at 4, 19.) It also demonstrates that they vacated the wrong
 2 counts in error. (*Id.* at 25–26.)

3 Mr. Jensen argues that this error—whether intentional or not—violated the Double
 4 Jeopardy clause because Mr. Jensen was sentenced twice for the same conduct. Mr. Jensen is
 5 incorrect. In *Missouri v. Hunter*, the Supreme Court held that “[w]ith respect to cumulative
 6 sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the
 7 sentencing court from prescribing greater punishment than the legislature intended.” 459 U.S.
 8 359, 366 (1983). Here, Mr. Jensen’s punishment would have been the same had he been
 9 sentenced under Counts I and IV, as the supreme court intended, or under Counts I and II, as the
 10 superior court actually ordered. (Dkt. No. 13, Ex. 33, at 4 n.2; Dkt. No. 13, Ex. 15 at 3). His
 11 punishment was therefore no greater than the legislature intended. The superior court’s
 12 sentencing mistake was merely an error of state law, and as the Supreme Court “ha[s] stated
 13 many times... federal habeas corpus relief does not lie for errors of state law.” *Estelle v.*
 14 *McGuire*, 502 U.S. 62, 67 (1991) (internal quotation marks omitted).
 15

16 The Court therefore denies Mr. Jensen’s first objection.
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18 **2. Objection Two: Competency**

19 Mr. Jensen next argues that that he was incompetent to stand trial, that his trial counsel
 20 was ineffective for not raising competency at trial, and that the court of appeals improperly
 21 declined to hold an evidentiary hearing on this issue during post-conviction review. The Court
 22 will address each of these arguments in turn.
 23

24 **a. Competency at Trial**

25 A defendant is competent to stand trial if “he has sufficient present ability to consult with
 26 his lawyer with a reasonable degree of rational understanding... [and] has a rational as well as

1 factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 402
 2 (1960). On appeal, a petitioner is required “to shoulder the burden of proving his incompetence
 3 by a preponderance of the evidence.” *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996).

4 The court of appeals correctly recognized that the standard for competency is whether
 5 Mr. Jensen “under[stood] the nature of the charges” and was “capable of assisting in his
 6 defense.” (Dkt. No. 13, Ex. 33, at 6.) The court found that Mr. Jensen “provide[d] no evidence
 7 in the record that there were any questions about his competency at the time of trial.” (*Id.*)
 8 Indeed, the court’s findings were entirely to the contrary:

9 the record suggests that Jensen was an informed and active participant in his
 10 defense. Jensen filed numerous pro se pleadings, including an articulate motion
 11 for a new trial based on ineffective assistance of counsel that was supported with
 12 legal authority and citations to the record. His testimony at trial was lengthy,
 13 coherent, and consistent, though apparently implausible to the jury. And Jensen
 14 attaches his own affidavit to this petition in which he described in detail his
 15 memory of the process that was followed during voir dire. In short, there is no
 16 evidence that anyone who interacted with Jensen at the time of trial had reason to
 17 doubt his competency.

18 (*Id.* at 5–6.) The Court has examined the record and finds that this determination was reasonable.
 19 At trial, Mr. Jensen gave detailed testimony about his education, marriage, personal life, and
 20 employment as a law enforcement officer. (Dkt. No. 13, Ex. 49, at 64–73.) He provided a
 21 coherent counternarrative to the prosecution’s solicitation charges. (*Id.* at 92.) And throughout
 22 his testimony, his answers were responsive to counsel’s questioning. Following the verdict, Mr.
 23 Jensen filed an articulate, well-cited pro se motion seeking a new trial. (*Id.*, Ex. 30, at App’x A.)
 24 But after consulting with his new counsel, Mr. Jensen agreed not to pursue the claims raised in
 25 this motion as they would not benefit his case. (*Id.*, Ex. 53, at 4.) All of this demonstrates that
 26 Mr. Jensen understood the charges against him and ably assisted in his own defense. Moreover,
 the Ninth Circuit has found “significant the fact that the trial judge, government counsel, and

1 [defendant's] own attorney did not perceive a reasonable cause to believe [defendant] was
 2 incompetent." *United States v. Lewis*, 991 F.2d 524, 528 (9th Cir. 1993). That was precisely the
 3 case here.

4 Mr. Jensen argues that all of this evidence is overcome by the opinion of Dr. George W.
 5 Woods, Jr., who evaluated him more than five years after trial. (Dkt. No. 13, Ex. 33, at 6.) Mr.
 6 Jensen argues that the court of appeals summarily dismissed Mr. Woods's opinion based on the
 7 decisions of other courts that previously rejected his opinion. This is an incorrect reading of the
 8 record. The court of appeals did not summarily dismiss Mr. Woods's opinion; rather, it found it
 9 "insufficient to establish facts that would entitle Jensen to relief." (*Id.* at 8.) And although the
 10 court noted that a number of other courts have "expressly rejected Dr. Woods's opinion," it did
 11 not rely only on this fact. (*Id.* at 7 n.3.) Instead, the court found Dr. Woods's report insufficient
 12 because it was "entirely conclusory." (*Id.* at 7.)

14 Mr. Jensen has therefore failed to establish that the court of appeals was unreasonable in
 15 finding him competent to stand trial.

16 **b. Ineffective Assistance of Counsel**

18 In his objections to the R&R, Mr. Jensen reiterates his argument that trial counsel was
 19 ineffective for failing to investigate Mr. Jensen's competency, and for failing to present this
 20 evidence to the trial court. In doing so, however, he objects to the R&R in the most general way,
 21 arguing only that "Mr. Jensen claimed that he was incompetent at the time of trial and that his
 22 attorney was ineffective for failing to investigate and present this fact." (Dkt. No. 24 at 7.) As the
 23 Court has held, "summaries of arguments previously presented, have the same effect as no
 24 objection at all, since the Court's attention is not focused on any specific issues for review."
 25
 26 *Wallin*, 2012 WL 4792923, at *2.

1 While the Court need not review this vague objection, it nonetheless notes that Mr.
 2 Jensen has failed to overcome the strong presumption that his counsel “rendered adequate
 3 assistance and made all significant decisions in the exercise of reasonable judgment.” *Strickland*
 4 *v. Washington*, 466 U.S. 668, 690 (1984). The Court has examined Mr. Jensen’s briefing, and his
 5 sole basis for arguing that counsel was ineffective is his assertion that counsel was aware that
 6 Mr. Jensen believed his mind- and mood-altering medications “were having an affect [sic] on
 7 him.” (Dkt. No. 24 at 14; Dkt. No. 13, Ex. 53, at 4.) Given all of the other evidence that Mr.
 8 Jensen was more than competent to stand trial, his counsel was hardly ineffective for deciding
 9 not to argue incompetency on this basis.

11 Finally, Mr. Jensen has also made no showing “that there is a reasonable probability that,
 12 but for counsel’s unprofessional errors, the result of the proceeding would have been different.”
 13 *Strickland*, 466 U.S. at 695.

14 Mr. Jensen has therefore failed to establish that the court of appeals was unreasonable in
 15 finding his trial counsel effective.

17 **c. Post-Conviction Evidentiary Hearing**

18 Mr. Jensen also argues that the court of appeals was unreasonable in finding him
 19 competent to stand trial because it did not conduct an evidentiary hearing. If a reviewing court
 20 possesses a “genuine doubt” as to a defendant’s competence, “due process requires the court on
 21 its own motion to hold a hearing and inquire into the defendant’s competence.” *States v. Lewis*,
 22 991 F.2d 524, 527 (9th Cir. 1993). “A good faith doubt about a defendant’s competence arises if
 23 there is substantial evidence of incompetence.” *Id*; *see also Panetti v. Quarterman*, 551 U.S. 930,
 24 949 (2007) (holding that a defendant must make “a substantial threshold showing of insanity”
 25 before a “fair hearing” is required).

1 As the Court has already explained, there was essentially no evidence at trial of Mr.
2 Jensen's incompetency. On appeal, the only additional evidence Mr. Jensen presented was Dr.
3 Woods's report. The court of appeals could therefore have reasonably decided that Mr. Jensen
4 did not make a "substantial threshold showing" of insanity and thus did not need to hold an
5 evidentiary hearing.

6 The Court therefore denies Mr. Jensen's second objection.

7 **3. Objection Three: Public Trial**

8 Mr. Jensen's next objection is that the trial court violated his public trial right by sealing
9 the juror questionnaires and excluding the public from voir dire.
10

11 A defendant has a right to a public trial, and this right extends to voir dire. *Presley v.*
12 *Georgia*, 558 U.S. 209, 213 (2010). But the Supreme Court has never held that the sealing of
13 juror questionnaires violates the public trial right. Therefore, the court of appeals' decision that
14 the sealing of the juror questionnaires did not violate Mr. Jensen's public trial right was not
15 contrary to well-established federal law.
16

17 Mr. Jensen also argues that his public trial right was violated because the trial court
18 allegedly closed the courtroom to the public during voir dire. Mr. Jensen's own affidavit was the
19 only evidence he presented that this closure actually occurred. (Dkt. No. 13, Ex. 33, at 12–13.) In
20 it, he alleged that the courtroom was closed to the public because: (1) all the seats in the
21 courtroom were taken up by jurors, except for one row which was closed for security purposes;
22 (2) during jury selection, someone opened the door to the courtroom from outside, spoke to the
23 officer standing at the door, and then closed it; and (3) spectators were allowed back in the
24 courtroom after jury selection was over. (*Id.* at 12–13.) The court of appeals reasonably found
25 that Mr. Jensen's affidavit was speculative and did not establish that a closure actually occurred.
26

1 (Id.) Indeed, there are several indications in the record that there was no closure.

2 First, when the judge discussed seating capacity for the prospective jurors, he never
 3 mentioned closing the courtroom. (Id., Ex. 40, at 9–10.) Second, when counsel proposed a “blind
 4 process” for making preremptory challenges, the judge declared instead that preremptory
 5 challenges “will be done in open court.” (Id. at 8–9.) The reference to “open court” would have
 6 made no sense if the courtroom were closed. Third, when the defense asked for an ex parte
 7 hearing on a discovery matter, the judge stated that he would decide whether to close the
 8 courtroom based only on a proper showing. (Id., Ex. 43, at 3–6.) The Court agrees with Judge
 9 Tsuchida that given the caution the trial judge demonstrated here regarding closure, it is highly
 10 unlikely that he would have closed the courtroom without comment during jury selection.

12 Mr. Jensen also argues that because the court of appeals was not presented with a
 13 transcript of voir dire, it was unreasonable in finding that there was no closure. The court of
 14 appeals was aware that Mr. Jensen, seemingly through no fault of his own, was unable to obtain
 15 the transcript. (Id., Ex. 33, at 12 n.5.) But it also found that he did not attempt to support his
 16 closure argument through affidavits of any of the other parties who were either present or
 17 excluded from voir dire. (Id.)

19 In response, Mr. Jensen argues that he was only entitled to subpoena these witnesses if
 20 the court of appeals ordered an evidentiary hearing, which it did not. But even without subpoena
 21 power, Mr. Jensen could still have attempted to obtain witness affidavits. Under Washington
 22 state law, Mr. Jensen’s own affidavit was insufficient to support his personal restraint petition or
 23 to trigger an evidentiary hearing, so he should have at least attempted to bolster his case with
 24 additional affidavits. *See In re Reise*, 146 Wash. App. 772, 789 (2008) (“We can resolve the
 25 petition solely on the current record and see no reason to remand for a reference hearing in
 26

1 superior court to resolve the disputed factual issues when the disputed facts arise only from a
 2 self-serving affidavit of the defendant, containing obvious fanciful declarations.”) Although Mr.
 3 Jensen implies that none of the witnesses would have cooperated unless subpoenaed, there is no
 4 indication he even investigated this possibility.

5 The Court is limited to the record that was before the state courts. *Cullen v. Pinholster*,
 6 563 U.S. 170, 180. On this record, it is clear that the court of appeals reasonably denied Mr.
 7 Jensen’s closure claim.

8 The Court therefore denies Mr. Jensen’s third objection.

9

10 **4. Objection Four: *Brady* Violation**

11 Mr. Jensen’s final objection is that the prosecution did not disclose impeachment
 12 evidence about Gregory Carpenter. Carpenter was the informant who first alerted the State that
 13 Mr. Jensen offered him money to kill his family while they were in prison together. (Dkt. 13, Ex.
 14 2, at 2–3.) Mr. Jensen argues that the prosecution suppressed evidence showing that Carpenter
 15 was arrested for drug possession on April 22, 2004 and was testifying to avoid the consequences.

16 The Constitution requires “disclosure only of evidence that is both favorable to the
 17 accused and ‘material either to guilt or to punishment.’” *United States v. Bagley*, 473 U.S. 667,
 18 674 (1985) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The “suppression by the
 19 prosecution of evidence favorable to an accused upon request violates due process where the
 20 evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of
 21 the prosecution.” *Brady*, 373 U.S., at 87.

22 To establish materiality, the petitioner must demonstrate “a reasonable probability that,
 23 had the evidence been disclosed to the defense, the result of the proceeding would have been
 24 different.” *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (internal quotation marks omitted). A

1 reviewing court must consider the undisclosed evidence in light of all the evidence presented by
 2 the prosecution, including forensic and other physical evidence and the testimony of other
 3 witnesses. *Id.* at 292–94. “[T]he question is whether the favorable evidence could reasonably be
 4 taken to put the whole case in such a different light as to undermine confidence in the verdict.”
 5 *Id.* at 290 (internal quotation marks omitted).

6 The court of appeals applied the correct standard for reviewing a *Brady* claim. (Dkt. No.
 7 13, Ex. 33, at 17.) It found that Mr. Jensen failed to establish that the State had not disclosed
 8 evidence of Carpenter’s arrest and that this evidence was not material but merely cumulative.
 9 The court’s decision on both of these grounds was entirely reasonable.

10 First, as the court pointed out, defense counsel impeached Carpenter with a police report
 11 stating that Carpenter had drugs in his possession when he was arrested on April 22, 2004. (*Id.*,
 12 Ex. 46, at 21–23.) The court of appeals was therefore reasonable in finding that Mr. Jensen failed
 13 to prove that the State withheld evidence about Carpenter’s drug arrest on this date.
 14

15 Second, Carpenter testified extensively about his criminal history on cross examination,
 16 openly admitting that he had “a lot of experience in crime.” (*Id.* at 5.) He testified that he was
 17 “raised...as a criminal and a gangster,” (*Id.*), was affiliated with a number of different gangs—
 18 some of which had killed people, (*Id.* at 16, 18–19, 26), and was a “professional career criminal.”
 19 (*Id.* at 59.) He admitted to being an informant in other cases. (*Id.* at 38–41.) And he ended his
 20 testimony by admitting that he talked to Mr. Jensen about killing his family “to set him up for
 21 what he is being tried for now.” (*Id.* at 63–64) The court of appeals was thus reasonable in
 22 finding that additional evidence about Carpenter’s credibility or his reason for testifying against
 23 Mr. Jensen would have been cumulative.
 24

25 The Court therefore denies Mr. Jensen’s fourth objection.
 26

C. Evidentiary Hearing

Mr. Jensen generally objects to Judge Tsuchida's recommendation that he be denied an evidentiary hearing. Once again, Mr. Jensen's objection lacks the specificity required by Fed. R. Civ. P. 72(b)(2), so the Court need not consider it.

But even had Mr. Jensen properly objected, he would not have succeeded. For a petitioner to successfully challenge the adequacy of state court fact finding, the reviewing court “must be satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court’s fact-finding process was adequate.” *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir. 2014). Mr. Jensen has failed to meet this standard.

Moreover, “an evidentiary hearing is pointless once the district court has determined that § 2254(d) precludes habeas relief.” *Sully v. Ayers*, 725 F.3d 1057, 1075 (9th Cir. 2013). Because the Court has made such a determination, an evidentiary hearing would be pointless.

D. Certificate of Appealability

Mr. Jensen does not object to Judge Tsuchida’s recommendation that he be denied a certificate of appealability. A certificate of appealability may issue only where a petitioner has made “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard “by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Court agrees with Judge Tsuchida that no jurist of reason could disagree with the Court’s resolution of Mr. Jensen’s claims or could conclude that they deserve encouragement to proceed further.

The Court therefore declines to issue a certificate of appealability.

1 **III. CONCLUSION**

2 For the foregoing reasons, Mr. Jensen's habeas petition (Dkt. No. 1) is DENIED. The
3 Court DECLINES to grant an evidentiary hearing or issue a certificate of appealability.

4 DATED this 19th day of May 2016.

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11 John C. Coughenour
12 UNITED STATES DISTRICT JUDGE